# JAMES IREDELL

## 1751-1799

## Lawyer, Statesman, Judge

BY
H. G. CONNOR
Judge United States Court, Eastern District
of North Carolina

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By H. G. CONNOR,
Judge United States Court, Eastern District North Carolina.

"The character of this excellent man has been too little known. Similar has been the fate of many other valuable characters in America. They are too little known to those around them; their modest merits have been too familiar, perhaps too uniform, to attract particular and distinguished attention."

James Iredell was born in Lewes, Sussex County, England, October 5, 1751. His father, Francis Iredell, a merchant of Bristol, married Margaret McCulloch. The family were allied by blood to Sir George Macartney, the Earl of Wigton, the Fergusons, McCullochs, and, by marriage, to Governor Lyttleton. Henry McCulloch was connected with the Government of the Province of North Carolina, where he owned large landed estates. Through the influence of relatives, James Iredell was appointed Comptroller of the Customs at Port Roanoke (Edenton) N. C. It was said at the time, "The office is genteel requiring little or no duty, so that he will have time to apply himself to business; it is worth upwards of one hundred pounds sterling a year." Iredell appropriated a large portion of his salary to the support of his father and mother, thus "illustrating in a forcible manner his filial piety and generous nature." He sailed for his new home, bringing with him his commission, and letters of introduction from friends in England, to several gentle-

[1]The writer has, for his information relied largely upon McRee's "Life and Correspondence of James Iredell." Except as otherwise indicated herein, quotations given are taken from it.

men in Edenton, arriving at the latter place "near the close of the year 1768." His biographer says of him: "He was then just seventeen years old, at the age when pleasures are enjoyed with the keenest relish. Frank, ingenuous, of pleasing appearance, winning manners, and educated in the best schools of England, he was kindly received and warmly welcomed."

The ancient borough of Edenton is situated on the northern shore of Albemarle Sound. It was founded in 1716, and named in honor of Eden, the Royal Governor. Mr. McRee says of the people to whom the young Comptroller came and among whom he resided during the remainder of his life: "If there was little of the parade and pomp of older communities, if many of the appliances of luxury were wanting, ease and abundance were the reward of but a slight degree of frugality and industry; the homes of the planters were comfortable and ample for all the purposes of hospitality; while their tables groaned beneath dainties beyond the reach of wealth on the other side of the Atlantic. * * * He who supposes the inhabitants were untutored people is grossly deceived. They were not refugees from the justice of the old world; nor were they of desperate fortunes or undisciplined minds—they were equal in cultivation, ability and patriotism to any of their contemporaries. The men were bold, frank, generous and intelligent; the females tender, kind and polite." The town contained about five hundred inhabitants. Of the residents of the town were Samuel Johnston, among the earliest, most enthusiastic and active Whigs, President of the Provincial Congress, Governor, and, upon the adoption of the Federal Constitution, the first United States Senator elected from the State, a lawyer of learning, a man of deep and extensive reading and singular purity of life spent in patriotic service to the State; Joseph Hewes, signer of the Declaration; Thomas Barker, Thomas Jones, Jasper Charl-

ton, Stephen Cabarrus, Robert Smith, Charles Johnston, John Johnston, and Sir Nathaniel Duckenfield. In the adjoining counties were Colonel Richard Buncombe, who, being mortally wounded at Germantown died in Philadelphia; John Harvey, Speaker of the Assembly, and later Moderator of the First and Second Provincial Congresses called in the Province (August, 1774, and April, 1775); and others of less note, but of liberal education and of honorable service and position. The society of the town furnished to Iredell a social circle of cultured and refined hospitality into which he at once entered. It is with Iredell's preparation for, and work as, a lawyer, statesman and judge that we are specially concerned, which precludes an entrance into the interesting and charming story of his personal and social life further than it illustrates his public career.

Very soon after his arrival he began the study of law with Samuel Johnston. "Every moment of leisure was devoted to his legal studies and to such intercourse with intelligent gentlemen and cultivated ladies as was calculated to refine and improve. He was a diligent student; he copied Mr. Johnston's arguments and pleas in important cases. He read carefully and attentively the text-books, referring to the authorities quoted, and collecting and digesting kindred passages from all writers within his reach; he attended the courts, returned to his chamber and wrote out arguments of his own, applicable to the cases he had stated." A few extracts from his "Journal" give us a fair view of the young Comptroller, preparing himself for the career which, all unthought of, awaited him. On August 22, 1770, he writes: "Indolence in any is shameful, but in a young man quite inexcusable. Let me consider for a moment whether it will be worth my while to attempt making a figure in life, or whether I will be content with mediocrity of fame and circumstances. * * * But nothing is to be acquired without industry;

and indolence is an effectual bar to improvement. * * * I have not done as much as I ought to have done; read a little in Lyttleton's Tenures and stopped in the middle of his Chapter on Rents; whereas I ought to have gone through it. It would have been better than losing three or four games at billiards. N. B.—If you do play billiards make it a rule not to lengthen."

We learn from his journal that, while studying Lyttleton, he did not neglect polite literature. He says: "I have been reading a volume of the Spectator, which is ever new, ever instructive, ever interesting. I hope they will be transmitted, with honor, to the latest ages. * * * Strength of reason, elegance of style, delicacy of sentiment, fertility of imagination, poignancy of wit, politeness of manners, and the most amiable pattern of human life, appears through the whole, in so conspicuous a manner as at once to improve and delight. * * * Resumed my Spectator; read a great many entertaining and improving things, particularly Mr. Addison's Discourses on Fame, in the fourth volume, which are incomparably elegant and sublime. Surely the writings of such great, learned and good men are more than a counterpoise to the libertine writings of professed Deists, whose immoral lives made them dread an encounter hereafter." He continues this train of reflection regarding the infidelity so prevalent at that time, concluding with words, which are of special interest, giving expression to a principle which controlled his private and public conduct throughout his life: "At a time when licentiousness is at an amazing and dangerous height we shall be careful to guard against popular prejudice, though we must not blindly oppose the public voice because it may appear too tumultuous. Let us do things impartially and not oppose or condemn any conduct on the whole, on account of a few improper circumstances attending it."

His journal shows that he was a diligent student of the "Tenures." On July 31, 1771, he writes his father, "I am too often troubling you, but I will hope for your excuse of this last request, as it will be of particular, perhaps necessary, service for me. It is that you will be so obliging as to procure Dr. Blackstone's Commentaries on the Laws of England and send them by the first opportunity. I have, indeed, read them by the favor of Mr. Johnston, who lent them to me, but it is proper that I should read them frequently and with great attention. They are books admirably suited for a young student, and, indeed, may interest the most learned. The law there is not merely considered as a profession but a science. The principles are deduced from their source and we are not only taught, in the clearest manner, the general rules of law, but the reasons upon which they are founded. * * * Pleasure and instruction go hand in hand, and we apply to a science, difficult, indeed, at best, with less reluctance, when by a well-directed application we may hope to understand it with method and satisfaction. I would take leave to add one more desire, that you would be pleased to send me the Tatlers and Guardians—the Spectators I have, and these, with the others, will afford me agreeable desultory reading."

Mr. Johnston was a faithful and competent instructor. "As a lawyer he was ever highly honored and esteemed; his patience, his industry, his logic were signal. * * * As early as 1776 he was one of a committee to revise the statutes of the State." He was later one of the State Judges. Mr. Iredell received from Governor Tryon a license to practice law in all the Inferior Courts of the Province on December 14, 1770. He was licensed by Governor Martin to practice in the Superior Courts November 26th, 1771, and duly qualified at the April Term, 1772. During the intervening year, "with healthy but vehement ambition," he prosecuted

his studies and regularly attended the courts. "Books he had not, save a volume or two stuffed into his saddle-bag with a scanty supply of apparel. * * * Iredell early fixed his eyes upon the glittering heights of his profession, and so self-assured was he of his capacity and industry that he never faltered in his purpose—he was resolute to win; and with such men to resolve is to compel success. If unemployed in the courthouse, he peopled his chambers with judge, jury and spectators; he argued his cases before his imaginary court and reported his own arguments." McRee gives an illustration of his habit of writing out arguments in cases tried in the courts, although not employed in them. It is interesting, both because of the careful and orderly statement of the facts and the logical arrangements of argument which marked his opinions when called into judicial service. The journal shows that, while preparing for his Superior Court license, Iredell was diligent in the study of Blackstone's Commentaries. The work had been published but a few years before and was widely read in America. Burke, in his speech on "Conciliation," stated that the booksellers informed him that as large a number of copies had been sold in America as in England. Iredell writes in his journal, "Came home and read an hour or two in Blackstone." "Employed myself all the rest of the evening reading Blackstone." "I immediately came home and finished the second volume of Blackstone."

The journal, during this year, leaves the reader in doubt whether he was most assiduous in his devotions to Miss Hannah Johnston or the great commentator. That he woeed both successfully is evidenced by the fact that on January 18, 1773, he was united in marriage to this estimable lady, who "supplemented what he needed. * * * She was his constant monitor, adviser, banker and trusted friend. * * * Their lives, united in one stream, flowed onward

softly and gently." She was the sister of Governor Samuel Johnston. Their correspondence, when separated by his riding the circuit in the practice of his profession and, later, in the discharge of his high official duties, is both interesting and instructive. Iredell's grandfather was a clergyman of the Church of England. His early religious training and his associations impressed their influence upon his mind and character. He was given to religious contemplation and often wrote "reflections" upon religious subjects quite remarkable for so young a man. Within a year after coming to Edenton he writes his Sunday "thoughts," concluding: "I am not ashamed to think seriously of religion, and hope no example will induce me to treat it with indifference. Youth is as much concerned to practice and revere it as any in the more advanced stages of life, and I have drawn up the foregoing plain, but useful, remarks as thinking it the best way of employing my time when I have had no opportunity of attending public worship." Writing his brother, he says: "Let me desire you to let no flashes of wit, or impertinent raillery of religion, shock your principles or stagger your belief. Men of this cast laugh at religion, either because they know nothing of it or care nothing for it. Men of shallow understandings or bad hearts are those who generally rank themselves in the list of free thinkers."

The controversies between the Royal Governors and the people in North Carolina began at an early day. They continued to grow in number and intensity. "Though a King's officer, Iredell soon became imbued with the views of the American leaders; felt that his future was identified with their future, and determined to participate in their defeat or success, to share in their disgrace or glory. He soon formed intimacies with the leading men of the Province, men whose thoughts were to irradiate subsequent darkness, and whose voices were destined to cheer and sustain the peo-

ple in the hour of disaster. Ere long he began with them an active correspondence, and his part was so well supported that a learned gentleman and most competent judge writes: 'He was the letter writer of the war. He had no equal amongst his contemporaries.' "

As early as September, 1773, he published his first political essay, saying, among other things: "I have always been taught, and till I am better informed must continue to believe, that the Constitution of this country is founded on the Provincial Charter, which may well be considered the original contract between the King and the inhabitants." "In 1774 the Revolution was fairly inaugurated in North Carolina. Nowhere were the points in dispute between the colonies and Great Britain more clearly stated or more ably argued. The people were generally agreed. * * * It is true that none meditated independence as an object of desire; but it was foreseen as a possible consequence. The contest, that was soon to be developed into flagrant war, was eminently, in North Carolina, based upon principle. The Whig leaders, ready with the pen and the columns of the newspapers and the pamphlets, discussed the tax on tea and the vindictive measures that followed the prompt opposition of Boston, with a degree of learning and logic that was not surpassed by any of their contemporaries in other provinces. * * * There was no array of class against class. The foremost in talent were foremost in all measures; they had the confidence of the people. The followers of such men as Harvey, Johnston, Ashe, Harnett, Hooper, and Caswell could not be otherwise than well informed. * * * In the quiet retreat of his study, with naught to stimulate but the promptings of his own honest heart and, perchance, the smile of his noble wife, with patient toil Iredell forged and polished the weapons of debate; if others fixed his mark he recked not who claimed the honor of the cast."

Mr. Iredell, at this time, began a correspondence with William Hooper, in which they discussed the questions engaging the attention of thoughtful men. On April 26, 1774, Hooper writes him: "Every man who thinks with candor is indebted to you for the share you have taken in this interesting controversy. * * * You have discussed dry truths with the most pleasing language, and have not parted with the most refined delicacy of manners in the warmth of the contest. * * * I am happy, dear sir, that my conduct in public life has met your approbation. It is a suffrage from a man who has wisdom to distinguish and too much virtue to flatter. * * * Whilst I was active in contest you forged the weapons which were to give success to the cause which I supported. * * * With you I anticipate the important share which the colonies must soon have in regulating the political balance. They are striding fast to independence, and ere long will build an empire upon the ruin of Great Britain; will adopt its Constitution, purged of its impurities, and, from an experience of its defects, will guard against those evils which have wasted its vigor and brought it to an untimely end."

The first Provincial Congress "called by the people themselves"—defying the threats of the Royal Governor—met in New Bern August 25, 1774. Iredell's friends, Johnston, Hewes, Thomas Jones, and Hooper, were conspicuous members. John Harvey was "Moderator." The first of Iredell's political efforts, which have been preserved, was addressed to "The Inhabitants of Great Britain." The address is set out in full in McRee's "Life and Correspondence," and contains an able and exhaustive statement and defense of the cause of the Americans. He gives the history of their coming and settling the province, the provisions of their charters and the violations of them by the King and his Parliament.

Iredell soon thereafter settled his accounts and closed his

career as Collector, to which position he had been promoted. After the 4th of July, 1776, he became deeply interested in the proposed form of government to be adopted by the new State. He had attended the courts, when open, and had given diligent attention to the practice of his profession. After the adoption of the Constitution (November, 1776) and the inauguration of a State Government a judicial system was established—"Iredell drawing the first Court Law." At the session of the Assembly, November, 1777, the State was laid off into three judicial districts; Samuel Ashe, Samuel Spencer, and James Iredell were appointed judges. His appointment was brought about by William Hooper, who writes December 23, 1777: "Before this reaches you you will have received the information of being promoted to the first honors the State can bestow. * * * You will be at a loss to conjecture how I could have been accessory to this step after you had been so explicit to me on the subject. Be assured that I was not inattentive to your objections, nor did I fail to mention them and urge them with sincerity to every person who mentioned you for the office to which you are now designated. * * * I expostulated with them upon the impropriety of electing one who in all probability might decline, and leave one of the seats of justice vacant. * * * Their reasoning prevailed and you have now the satisfaction of an unrestricted choice. The appointment has been imposed upon you, and therefore you are at perfect liberty to act or not." Archibald Maclaine wrote: "I can only say that if it would answer your purposes as fully as it would please your friends and the public, it would give me real satisfaction." When it is remembered that at this time Iredell was but twenty-seven years old; that only ten years prior thereto he had come to the State a youth of seventeen, unknown, without wealth or other influences, his election, unsought and against his inclination, to the highest judicial

position in the State, it is manifest that by his personal conduct and character, as well as his learning and ability, he had strongly and favorably impressed himself upon the people and their representative men. William Hooper was a lawyer of learning and experience, as were other members of the Assembly. Maclaine, also an eminent lawyer and member of the Assembly, thus expressed the opinion of his associates: "However arduous the task you have undertaken, we have the most hopes from your judgment and integrity, and these hopes are strengthened by your diffidence. * * * The members of the Assembly, in appointing you, thought, with great reason, that they effectually served themselves and their constituents. As to myself, I confess I was actuated by duty to the public, having been taught that your promotion would more effectually serve them than you." Iredell accepted the judgeship at much personal sacrifice. The salary was totally inadequate for the support of his family.

Replying to a letter from Governor Burke calling upon him to hold Courts of Oyer and Terminer, he says: "In regard to the courts your Excellency proposed immediately to establish, I am always ready to attend them as my duty requires, but I take the liberty to represent to your Excellency that I fear that I shall not be able to defray the expenses they will involve me in unless I receive a sum of money from the public. * * * I am not ashamed of confessing my poverty, as it has not arisen from any dishonorable cause. My circumstances have suffered deeply, but if I can bear myself above water I am content to suffer still. * * * I shall not fail to do my utmost then and at all times in discharge of my duty."[2]

He rode one circuit, during which his letters to his wife give an interesting account of the country through which he traveled, the people with whom he was associated and the

[2]State Records of N. C., XXII, 552.

experiences of a judge "on circuit" at that early period in our history. He went as far west as Salisbury. At the Edenton term, June 6, 1778, the grand jury requested that he furnish his charge for publication, saying: "This charge vindicates the American States, in the establishment of independency, by arguments drawn from undeniable rights and from real necessity, and grounded on incontestable facts. * * * It breathes a spirit of pure disinterested patriotism, and holds forth the most powerful incentive to persist in the opposition which America has so successfully begun. It points out persuasively the importance of a faithful observation of the various political and relative duties of security upon which the happiness of individuals and of the whole depends, and which will tend to give stability to our present Constitution."

The language of the charge is spirited, the sentiment patriotic, with considerable warmth of expression towards the King and his ministers. A few extracts will give an idea of its general tone. Referring to the fact that no courts had been held for a long time, he says: "This court of justice opens at a most interesting period of the policy of this country. We have been long deprived of such, from a variety of causes, in some of which we have shared with our brethren on the Continent; others were peculiar to ourselves. The event, however, has been unhappy and distressing, and every wellwisher to his country must view with pleasure a scene of anarchy changed to that of law and order, and powers of government established capable of restraining dishonesty and vice. Such powers have been established under circumstances which should induce to them peculiar reverence and regard. They have not been the effect of usurpation; they have not proceeded from a wanton desire of change; they have not been imposed upon you by the successful arms of a tyrant; they have been peaceably established by the public at large,

for the general happiness of the people, when they were reduced to the cruel necessity of renouncing a government which ceased to protect, and endeavored to enslave them, for one which enabled them, with a proper share of courage and virtue, to protect and defend themselves. * * * We desired only the privileges of a free people, such as our ancestors had been and such as they expected we should be. We knew it was absurd to pretend we should be free when laws might, at pleasure, be imposed upon us by another people. * * * Our ancestors came here to enjoy the blessings of liberty. They purchased it at an immense price. Their greatest glory was that they had obtained it for themselves and transmitted it to their posterity. God forbid that their posterity should be base or weak enough to resign it, or let it appear that the true British spirit, which has done such wonders in England, has been lost or weakened by being transplanted to America. * * * You will, I hope, excuse, gentlemen, the particular, perhaps too great particularity, with which I have gone into this subject. Yet I thought it my duty to point out to you some of the principles upon which the revolution in our government has taken place and which, in my opinion, prove not only the propriety of its being effected, but the indispensable obligation we are under to maintain and support it. * * * The struggles of a great people have almost always ended in the establishment of liberty. The enjoyment of it is an object worthy of the most vigilant application and the most painful sacrifices. Is there anything we read with more pleasure than the sufferings and contentions of a brave people who resist oppression with firmness, are faithful to the interests of their country and disdain every advantage that is incompatible with them? Such a people are spoken of with admiration by all future ages. * * * These are the glorious effects of patriotism and virtue. They are the rewards annexed to the faith-

ful discharge of that great and honorable duty, fidelity to our country."

Referring to the burdens laid upon the colonists and their right to resist them, he says: "We knew of no right they could have to such a power. Our charters did not recognize it. It certainly was not in our ancestors' contemplation, who left that very country because freedom could not be enjoyed in it. Custom had given it no sanction. * * * It was reconcilable to no principles of justice. * * * We despised the miserable application of a few political maxims * * * which to this hour is the basis upon which all the fraud, iniquity, injustice, cruelty and oppression that America has experienced from Great Britain have been defended. * * * The divine right of kings was exploded with indignation in the last century. Men came at length to be persuaded that they were created for a nobler purpose than to be slaves of a single tyrant. They did not confine this idea to speculation; they put to death one King and expelled another. This was done in England, the seat of our haughty enemies, who seem to think the right of resistance is confined alone to their kingdom." When it is remembered that this charge was delivered at a time when the American cause was far from hopeful, the courage exhibited was of no low order. Iredell, too, was a conservative—but withal a man and a patriot.

Soon thereafter he sent his resignation to the Governor, who accepted it with much reluctance, saying, "as you can well conceive, well knowing your place can not be supplied by a gentleman of equal ability and inclination to serve the State." He continued the practice of the law until, on July 8, 1779, he was tendered and accepted the position of Attorney General. Hooper writes, expressing pleasure that he has consented to accept, saying: "I have the happiness to assure you that the leading characters in this part of the

country [Cape Fear] speak of you as a capital acquisition to our courts, and exult that there is a prospect of offenders being brought to due punishment without the passions of party or the prejudice of individuals swaying the prosecution." Iredell traveled the circuit, attending the courts in the discharge of his duties and receiving a large share of civil business. His letters to Mrs. Iredell give an interesting and often amusing account of his experiences. From New Bern he writes: "Expenses are enormous. My last jaunt has cost me $600 on the road and the depreciation will certainly proceed most rapidly, for they are giving away the money at the printing office in so public and careless a manner as to make it quite contemptible." Again he writes: "There has not been much business, but I have been applied to in almost everything. I have already received in civil suits 1,240 pounds in paper besides nineteen silver dollars. I expect to receive tomorrow 500 pounds and my salary for this and Edenton Court, which will be 1,000 pounds. * * * My fear is that, as usual, the money will be much depreciated before I lay it out. I shall carefully preserve the hard money to the last." From New Bern, at the following term, he writes Mrs. Iredell that he has received 4,540 pounds "of this currency," 1,350 pounds of Continental, and $9 in hard money; that he will receive 1,500 pounds for his salary at these courts, "but my expenses here are monstrous—160 pounds a day for my board and lodging only." At Wilmington he was employed in the first admiralty case tried in the State of which the record is extant. The Assembly at Halifax, 1781, voted the judges 20,000 pounds each and the Attorney General 10,000 pounds "for making up the depreciation of their allowance." Iredell resigned his office (1781), of which, writing to his brother, Rev. Arthur Iredell, July, 1783, he says: "Since then I have been only a private law-

yer, but with a show of business very near equal to any lawyers in the country."

After the ratification of the Treaty of Peace and the withdrawal of troops from the State, the people began the work of restoring their fortunes and enacting laws suited to their new political situation. Differences, more or less fundamental, which had manifested themselves during the war, became more marked—dividing the leaders and people into parties. Iredell was in agreement with the conservatives, Johnston, Hooper, Maclaine, Davie, Spaight, and others, in opposition to Willie Jones, Thomas Person, Samuel Spencer, and others. The former insisted that the State should carry out in good faith the terms of the treaty, and adopt such measures as were necessary for that purpose; enforce contracts and maintain a strong and stable government. While Iredell neither held nor sought any public position, he was "in touch," through correspondence and otherwise, with the leaders of the party known as Conservatives. He prosecuted the practice of his profession with industry and success, ranking easily with the leaders of the bar. The more radical sentiment in the State was disposed to magnify the power of the Legislature and oppose any restriction upon it by the enforcement of Constitutional limitations, especially by the courts. In an address to the public, Iredell set forth his views regarding the enforcement of Constitutional limitations upon the Legislature. Referring to the Convention (November, 1776), which formed the Constitution, he says: "It was of course to be considered how to impose restrictions on the Legislature that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any men or body of men on earth. We had not only been sickened and disgusted for years with

the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under the effects. We felt, in all its rigor, the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust as well as the grossest folly if in the same moment, when we spurned at the insolent despotism of Great Britain, we had established a despotic power among ourselves. * * * I have no doubt but that the power of the Assembly is limited and defined by the Constitution. It is a creature of the Constitution. * * * These are consequences that seem so natural, and indeed so irresistible, that I do not observe that they have been much contested. The great argument is, that although the Assembly have not a right to violate the Constitution, yet if they in fact do so, the only remedy is either by a humble petition that the law may be repealed or a universal resistance of the people. But, in the meantime, their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an act of Assembly." He proceeds, with remarkable clearness and force, to set forth his opinion upon this question, expressing the view which has since been pursued by the courts, both State and Federal. He concludes: "These are a few observations that have occurred to me on this subject. They are given by a plain man, unambitious of power, but sincerely and warmly interested in the prosperity of his country; feeling every respect for the Constitutional authority of the Legislature which, in his opinion, is great enough to satisfy an ambitious as well as support the efforts of a public-spirited mind, but a determined enemy on all occasions of arbitrary power in every shape whatever, and reverencing beyond expression that Constitution by which he holds all that is dear to him in life." It must be remembered that these views were ex-

pressed before any court had held that it was within the power and therefore the duty of the judiciary to refuse to enforce statutes passed without Constitutional warrant. The question had been mooted, and in one case passed upon, prior to the date of Iredell's address (1786), but the opinion of the Court had not been published beyond the jurisdiction in which it was decided. Richard Dobbs Spaight, while a member of the Convention at Philadelphia (August 12, 1877) in a letter to Iredell, refers to the action of the judges in holding an act depriving litigants of trial by jury (*Bayard v. Singleton,* 1 Martin, 42) unconstitutional. He laments "that the Assembly have passed laws unjust in themselves and militating in their principles against the Constitution in more instances than one." He says: "I do not pretend to vindicate the law, which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do most positively deny that they have any such power; nor can they find anything in the Constitution, either directly or impliedly, that will support them or give them any color of right to exercise that authority. * * * It must be acknowledged that our Constitution unfortunately has not provided a sufficient check to prevent the intemperate and unjust proceedings of our Legislature, though such a check would be very beneficial, and I think absolutely necessary to our well being; the only one that I know of is the annual election which, by leaving out such members, will in some degree remedy, though it can not prevent, such evils as may arise." On August 26, 1787, Iredell answered Mr. Spaight's letter at length, saying: "In regard to the late decision at New Bern, I confess that it has ever been my opinion that an act inconsistent with the Constitution was void, and that the judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a funda-

mental law, limiting the powers of the Legislature, and with which every exercise of those powers must be compared." In regard to his apprehension that the power will be abused, Iredell says: "If you had seen, as I did, with what infinite reluctance the judges came to this decision, what pains they took by proposing expedients to obviate its necessity, you would have seen in a strong light how little probable it is a judge would ever give such a judgment when he thought he could possibly avoid it. But whatever may be the consequences, formed as our Constitution is, I can not help thinking they are not at liberty to choose, but must in all questionable instances decide upon it. It is a subject indeed of great magnitude, and I heartily lament the occasion for its discussion. In all doubtful cases, to be sure the act ought to be supported, it should be unconstitutional beyond dispute before it is pronounced such."

The Convention at Philadelphia having submitted the new Federal Constitution to the Legislatures of the States, Iredell at once entered upon the task of securing its adoption by the people of North Carolina. In no State was the opposition more pronounced or determined. The popular leaders of the dominant party were active in their opposition, one of the most prominent of them declaring that "Washington was a d—n rascal and traitor to his country for putting his hand to such an infamous paper as the new Constitution." Another, said to have been the most popular leader in the State, seriously insisted in the Convention upon rejecting it without discussion, saying that he had made up his mind and was sure that others had done so. "Of all those who were most active in pressing upon the people the adoption of the Constitution Mr. Iredell was undoubtedly the most able and energetic."

At the session of the Legislature November, 1787, Mr. Johnston was elected Governor and Mr. Iredell a member

of the Council; he was also appointed a commissioner to revise and collect the Acts of the General Assembly, then in force. A convention of the people was called to meet at Hillsboro, composed of delegates from the several counties and the borough towns. Iredell was elected, unanimously, from Edenton. On January 8, 1788, he published a pamphlet entitled "Answer to Mr. Mason's Objections to the New Constitution Recommended by the late Convention at Philadelphia," by "Marcus." He stated each of Mr. Mason's "objections" in their order, and in the same order answers them. It is not within the scope of this sketch to undertake a review of Mr. Iredell's "answer" to the celebrated paper of Mr. George Mason. The pamphlet made a favorable impression on the public mind and strongly influenced Iredell's future career. The correspondence between Iredell and William Hooper, William R. Davie and Maclaine gives an interesting view of the condition of public sentiment in the State in regard to the new Constitution. Says one, writing of the leaders in the Convention: "The most prominent Federalists were Iredell, Davie, Governor Johnston, Spaight, Maclain [sic] and Steele. Foremost in their number and the leading spirit of the whole body was Judge Iredell, conspicuous for his graceful elocution, for the apt application of his varied learning, his intimate knowledge of the schemes of government, and his manly and generous temper.

"Davie, with spotless plume, towering in intellect, as in stature, above the majority of the members, stood like a knight of the olden time, lance in hand, the luster of his military services played about him and was reflected in flashing light from hauberk, morion and polished steel.

"Governor Johnston, the President of the Convention, calm, lucid and convincing, seldom participated in the debate; when he did, his blows were always delivered with stunning effect.

"Maclaine, sensible, pointed and vigorous, was the Hotspur of his party.

"Steele was laborious, clear-sighted and serviceable by his knowledge of men.

"Willie Jones, although democratic in theory, was aristocratic in habits, tastes, pursuits and prejudices; he lived sumptuously and wore fine linen; he raced, hunted and played cards. A patriot in the Revolution, he was now the head of a great party. * * * He was a loving and cherished disciple of Jefferson, and was often taunted with his subserviency to Virginia 'abstractions.' He seldom shared in the discussions.

"Judge Spencer, candid and temperate, was in debate far superior to his associates.

"David Caldwell, a Presbyterian divine, was learned and intelligent. He had for years discharged the triple functions of preacher, physician and teacher.

"McDowell, the rival of Davie in military renown, was a man of action rather than words.

"Bloodworth, by no means the least among them, was one of the most remarkable men of the era, distinguished for the versatility of his talents and his practical knowledge of men, trades, arts, and sciences. The child of poverty, diligence and ambition had supplied the place of patronage and wealth; he was resolute almost to fierceness, and almost radical in his democracy."

William Hooper, General Allen Jones, William Blount, and Judge Ashe were defeated at the polls.

The debates were conducted with ability and dignity, and at times with much asperity. While Davie, Spaight, Maclaine and Johnston bore their share, Iredell was the acknowledged leader for adoption. The proceedings of the Convention are published in Elliott's Debates. The opposition could not be overcome and, on the final vote, the Constitution was

rejected by a vote of 184 to 84.[3] While Iredell was defeated he made many friends and advanced his reputation in the State. One of the new western counties was given his name. The requisite number of States having ratified the Constitution, the new government was organized April 30, 1789, North Carolina taking no part but remaining a free, sovereign, independent State.

It appears from the letters of the Honorable Pierce Butler, Senator from South Carolina, written from New York, August 11, 1789, that Iredell's reputation had extended beyond the borders of the State. He says: "The Southern interest calls aloud for some such men as Mr. Iredell to represent it—to do it justice." Dr. Williamson writes, at the same time: "The North Carolina Debates are considerably read in this State, especially by Congress members, some of whom, formerly had little knowledge of the citizens of North Carolina, have lately been very minute in their inquiries concerning Mr. Iredell. By the way, I have lately been asked by a Senator whether I thought you would accept a judge's place under the new government if it required your moving out of the State, as we are not in the Union." A second Convention met at Fayetteville November 2, 1789. Iredell was not a candidate for election as a delegate. With but little debate the Constitution was ratified and amendments proposed. A bill was passed establishing a university, the names of Samuel Johnston and James Iredell being placed at the head of the list of trustees.[4]

Maclaine writes Iredell December 9, 1789: "What would you think of being the District Judge?" He was soon called to a larger field and higher judicial service. On February 10, 1790, without solicitation on his part, Mr. Iredell was nominated by President Washington, and unanimously con-

[3]Convention of 1788.—N. C. Booklet, Vol. IV.
[4]Battle's History of the University of North Carolina, 821

firmed by the Senate, one of the Associate Justices of the Supreme Court of the United States. He was just thirty-nine years old. The President enclosed his commission with the following letter: "One of the seats on the bench of the Supreme Court of the United States having become vacant by the resignation of the gentleman appointed to fill the same, I have thought fit, by and with the advice and consent of the Senate, to appoint you to that office, and have now the pleasure to enclose you a commission to be one of the Associate Judges of the Supreme Court of the United States. You have, sir, undoubtedly considered the high importance of a judicial system in every civil government. It may therefore be unnecessary for me to say anything that would impress you with this idea in respect to ours. * * * I must, however, observe that, viewing as I do the Judicial System of the United States as one of the main pillars on which our National Government must rest, it has been my great object to introduce into the high offices of that department such characters as, from my own knowledge or the best information, I conceived would give dignity and stability to the government * * * at the same time that they added luster to our national character." It is said that "Washington derived his conviction of Iredell's merits from a perusal of the Debates in the North Carolina Convention and the famous reply to George Mason's objections."[5] Butler wrote Iredell February 10th: "I should have been happy to have had you in Congress. The Union will no longer be deprived of your aid and the benefit of your abilities. * * * I congratulate the States on the appointment and you on this mark of their well-merited opinion of you." Acknowledging the letter from the President, Iredell writes: "In accepting this dignified trust I do it with all the diffidence becoming the humble abilities I possess; but, at the same time, with

[5]Carson's History of the Supreme Court, 155.

the most earnest resolution to endeavor by unremitting application a faithful discharge of all of its duties, in the best manner in my power." Judge Iredell was assigned to the Southern Circuit and entered upon the work immediately. He reached Charleston May 23, 1790, and there met Mr. Rutledge before whom he took the oath of office. He writes Mrs. Iredell: "I have received the greatest and kindest civilities from Mr. Rutledge, at whose house I have the pleasure of staying." He proceeded to Savannah. There was but little business in the new Court other than organizing the Circuit Courts and putting the new judicial system in working order. Supposing that the judges would "rotate" in the Circuit Court work, he removed his family to New York. The Court having, to his surprise, adopted the rule which confined judges to one circuit—Iredell's being the Southern—he found himself very much embarrassed. The long distance to be traveled (1,900 miles) twice each year was a severe tax upon his health and strength. He justly complained of the arrangement to the Chief Justice, who conceded that "your share of the task has hitherto been more than in due proportion." Although the judges refused to make a more equitable rule, by exchanges, they sometimes rode different circuits. Justice Iredell took his seat with the Chief Justice and his associates at the August Term, 1790. No business was transacted, the Court adjourning *sine die*. Iredell again rode the Southern Circuit, but it does not appear that there was much business to engage his attention.

William Hooper, to whom Iredell was strongly attached, and for whose character and talents he had the highest regard, died October 14, 1790. Writing a letter of condolence to Mrs. Hooper, Iredell said: "An attachment founded on the most perfect esteem and upon a gratitude excited by repeated and most flattering obligations, ought not, and, in me, I trust is not capable of being weakened by any change of place, time or circumstance."

A suit was instituted at this time in the State Court against Iredell and his co-executor upon a bond given by their testator to a British subject. His co-executor pleaded the "Confiscation Act," in which Iredell refused to join. By direction of Justices Wilson, Blair and Rutledge a writ of *certiorari* was issued to the State Court, which the judges refused to obey. As an indication of the jealousy of the new government in the State, the General Assembly adopted a resolution declaring that "The General Assembly do commend and approve of the conduct of the judges of the Courts of Law and Courts of Equity in this particular."[6] At the same session the House of Commons, by a vote of twenty-five to fifty-five, refused to adopt a resolution requiring the Governor and other State officials to take an oath "to support the Constitution of the United States."

On the Southern Circuit at Savannah (1791) a question arose, stated by Judge Iredell, as follows: "There were depending some suits for the recovery of debts, to which pleas were put in by the defendants, not denying the existence of the debts, but showing (as they conceived) a right in the State of Georgia to recover them under certain Acts of Assembly of the State passed prior to the Treaty of Peace. The Attorney and Solicitor General of the State were directed to interfere in the defense, but the counsel for the defendants refused to permit them. The Attorney and Solicitor General, being dissatisfied with the pleas, applied to the Court for leave to interfere in behalf of the State." Judge Iredell was of the opinion that the State could appear only in the Supreme Court, and for this reason denied the motion. He suggested that the State had a remedy by an appeal to the Equity jurisdiction of the Supreme Court. Deeply impressed with the gravity as well as the novelty of the question he writes: "I have been thus particular in stating this inter-

[6]State Records, XXI, 441, 865, 1080, 1082.

esting subject, because it appears to me of the highest moment, although I believe it would be difficult to devise an unexceptionable remedy. But the discussion of questions wherein are involved the most sacred and awful principles of public justice, under a system without precedent in the history of mankind, necessarily must occasion many embarrassments which can be more readily suggested than removed." Out of these suits arose the celebrated case of *Georgia v. Brailsford,* 2 Dallas, 402; 3 Dallas, 1.

At the April Term, 1792, of the Circuit Court at Savannah Judge Iredell delivered a charge to the grand jury which so impressed the members that they unanimously requested its publication. A number of his "charges" in other circuits were published at the request of the grand juries. At the June Term, 1792, at the Circuit Court at Raleigh, N. C., Judge Iredell, with District Judge Sitgreaves, was confronted with a delicate question. Congress had enacted a statute directing that the invalid pension claims of widows and orphans should be exhibited to the Circuit Courts; that those to whom the Court granted certificates should be placed on the Pension list, subject to the review of the Secretary of War. Conceiving that the duties thus imposed were not judicial in their character, and therefore not authorized by the Constitution, which carefully separated the powers and duties of each department of the Government, Judge Iredell prepared a remonstrance, addressed to the President, in which he said:

"We beg leave to premise that it is as much our inclination as it is our duty to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the actual question undoubtedly is. But however

lamentable a difference really may be * * * we are under the indispensable necessity of acting according to the best dictates of our judgment." He set forth at length the reasoning by which he had been brought to the conclusion that he could not, with proper regard to the Constitutional distribution of powers, execute this statute, concluding: "The high respect we entertain for the Legislature, our feelings as men for persons whose situation requires the earliest as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on this as well as on many other occasions, have induced us to reflect whether we could be justified in acting under this act personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so we would cheerfully devote such part of our time as might be necessary for the performance of the service." The other Justices addressed similar letters to the President. The question was brought before the Court by a motion made by Attorney General Randolph, *ex officio,* for a *mandamus* directed to the Circuit Court for the District of Pennsylvania, commanding the Court to proceed to hear the petition of William Hayburn, etc. The Court being divided in opinion whether he could make the motion *ex officio,* he was permitted to do so on behalf of Hayburn. No decision was made at the time and Congress soon thereafter "made other provisions for the relief of pensioners." Judge Iredell, until the act was repealed, heard a large number of petitions as commissioner. He writes Mrs. Iredell from Hartford, Connecticut, September 30, 1792: "We have a great deal of business to do here, particularly, as I have reconciled myself to the propriety of doing the invalid business out of court." In *United States v. Ferreria*, 13 Howard, 51, Chief Justice Taney says of the action of the Court: "The repeal of the act clearly

shows that the President and Congress acquiesced in the correctness of the decision, that it was not a judicial power."

Following the refusal to permit Georgia to intervene in the Brailsford case, in the Circuit Court, the State filed a bill in equity in the Supreme Court, alleging that the title to the bond, upon which the action in the Circuit Court was brought, was, by virtue of an act passed during the war, confiscating and sequestrating the property and debts of British subjects in the State. The Court was asked to enjoin the plaintiffs from proceeding, etc. Each of the Judges wrote opinions. Iredell observed that he had sat in the Circuit Court and refused the motion of the State to intervene. He said that the Court could not, with propriety, sustain the application of Georgia because whenever a State is a party the Supreme Court has exclusive jurisdiction of the suit. The State, therefore, did not have a complete and adequate remedy at law. "Every principle of law, justice and honor, however, seem to require that the claim of the State of Georgia should not be indirectly decided or defeated by a judgment pronounced between parties over whom she had no control, and upon a trial in which she was not allowed to be heard." He was of the opinion that an injunction should be awarded to stay the money in the hands of the Marshal until the Court made further orders, etc. The Court was divided in opinion, the majority holding that an injunction should issue until the hearing. At the February Term, 1793, a motion was made by Randolph to dissolve the injunction. Iredell was of the opinion that the motion should be denied. He held that, for several reasons, the State could not sue on the bond at law, asking: "How is she to obtain possession of the instrument without the aid of a Court of Equity?" pointing out the practical difficulties which she would encounter in securing the bond. To the suggestions that the State could bring an action of assumpsit for money had and received

against Brailsford, which he termed "the legal panacea of modern times," he conclusively answers that while the action "may be beneficially applied to a great variety of cases, it can not be pretended that this form of action will lie before the defendant has actually received the money," and this Brailsford has not done. He suggests that the injunction be continued, and an issue be tried at the bar to ascertain whether the State of Georgia or Brailsford was the true owner. Although a majority of the Judges were of the opinion that the State had an adequate remedy at law, the course suggested by Iredell was substantially pursued. At the February Term, 1794, an amicable issue was submitted to a special jury. The argument continued for four days, when the Chief Justice instructed the jury: "The facts comprehended in the case are agreed; the only point that remains is to settle what is the law of the land arising upon those facts; and on that point it is proper that the opinion of the Court should be given." He says that the opinion of the Court is unanimous, that the debt was subjected, not to confiscation, but only to sequestration, and that therefore the right of the creditor to recover it was revived at the coming of peace, both by the law of nations and the Treaty of Peace. It is not very clear what question of fact was submitted to the decision of the jury. He further instructed the jury that while it was the "good old rule" that the Court should decide questions of law and the jury questions of fact, the jury have a right, nevertheless, to take upon themselves to judge of both and to determine the law as well as the facts. The learned Chief Justice suggests that the Court "has no doubt that you will pay that respect which is due to the opinion of the Court; for, as on the one hand, it is presumed that juries are the best judges of facts, it is, on the other hand, presumable that the courts are the best judges of law. But still both objects are lawfully within your power of decision."

Notwithstanding the facts were agreed upon and the Court was ananimous in opinion in regard to the law, the jury, "after being absent some time," returned to the bar and proposed certain questions of law, which being answered, "without going away from the bar," they returned a verdict for the defendant. The case has the distinction of being the only one in which a jury was empaneled in the Supreme Court. Flanders says: "The charge of the Chief Justice to the jury is curious, from the opinions he expressed as to the extent of their powers. His statement of the law on that point is clearly erroneous."[7] Mr. James Scott Brown says: "The judgment was clearly right, but the statement of the Chief Justice that the jury was judge of the law, as well as the facts, is open to serious doubt."[8]

In *Chisholm v. Georgia,* 2 Dallas, 419, standing alone, Iredell enunciated and, with a wealth of learning and "arsenal of argument," maintained the position that a State could not be "haled into court" by a citizen of another State. The question arose in an action of assumpsit instituted in the Supreme Court against the State of Georgia, process being served upon the Governor and the Attorney General. The State refused to enter an appearance, but filed a remonstrance and protest against the jurisdiction. The Attorney General, Randolph, representing the plaintiff, lodged a motion that unless the State entered an appearance and showed cause to the contrary, by a day named, judgment by default and inquiry be entered, etc. This motion was argued by Randolph, the State not being represented. Each of the justices filed opinions. Iredell first analyzed the provisions of the Constitution conferring jurisdiction upon the Court in controversies wherein a State was a party. He quotes the language of the Judiciary Act distributing the jurisdiction in such cases.

[7]Lives of the Chief Justices, 393.
[8]Great American Lawyers, Vol. I, 285.

He dwells somewhat on the meaning which should be given to the word "controversies" in the Constitution, with the suggestion that the use of this word indicated a purpose to so restrict the causes in which jurisdiction was conferred as to exclude actions at law for the recovery of money. He proceeds to consider the question whether it is necessary for Congress to prescribe a method of procedure in controversies wherein the State is a party. He argues that while the judicial department of the government is established by the Constitution, the Congress must legislate in respect to the number of the Judges, the organization of the Supreme and such inferior courts as may be established, etc. He quotes the fourteenth section of the Judiciary Act, in which power is conferred upon the courts to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and "agreeable to the principles and usages of law," noting the fact that "neither in the State now in question, nor in any other in the Union, any particular legislation authorizing a compulsory suit for the recovery of money against a State was in being, either when the Constitution was adopted or at the time when the Judicial Act was passed," and concludes that only principles of the common law, a law which is the ground work of the laws in every State in the Union and which, so far as it is applicable to the peculiar circumstances of the country, and when no special act of legislation controls it, is in force in such State, as it existed in England at the time of the first settlement of this country; that no other part of the common law of England can have any reference to the subject but that which prescribes remedies against the Crown. Thus he is brought to the decision of the real question in the case. It is manifest that if, until Congress has prescribed some mode of procedure by which, in controversies wherein the State is a

party, the Court must proceed by a mode "agreeable to the principles and usages of law," and, to find such principles and usages, resort must be had to the common law, the question necessarily arises whether the States of the Union, when sued, are to be proceeded against in the same manner as, by the common law, is prescribed for proceeding against the Sovereign. It is just at this point that the line of thought between Iredell and Wilson divides. The former says: "Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States in respect to the powers surrenderd; each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them; of course the powers not surrendered must remain as they did before. * * * So far as the States, under the Constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is, in this respect, limited. But it is limited no further than the necessary execution of such authority requires." It will be observed that Iredell is not, at this point in the argument, discussing the question whether it is within the power of Congress to prescribe a mode of procedure for bringing a State into the Federal Court to answer for a money demand by a citizen of another State. The argument is that, until it has done so, the only method of proceeding against a State is that prescribed by the common law for proceeding against the Sovereign. It therefore becomes necessary to follow the argument and establish the proposition that prior to the formation and ratification of the Constitution each State was a sovereign, and that in ratifying the Constitution it did not part, in respect to the *mode* of proceeding against it in a controversy in

the Federal Courts, with its sovereignty. He proceeds to give an exhaustive and interesting history of the method of procedure for the recovery of money at the common law against the King. The history of the law in England in this respect, although very interesting, has no permanent interest to the student of American Constitutional law. He thus concludes this branch of the discussion: "I have now, I think, established the following propositions: First, that the Court's action, so far as it affects the judicial authority, can only be carried into effect by acts of the Legislature, appointing courts and prescribing their method of procedure; second, that Congress has provided no new law, but expressly referred us to the old; third, that there are no principles of the old law to which we must have recourse that, in any measure, authorizes the present suit, either by precedent or analogy."

This conclusion was sufficient, from Iredell's point of view, to dispose of the case before the Court, but Judge Wilson, who wrote the principal opinion for the majority, threw down the gauntlet and challenged the basic proposition upon which Iredell's argument was founded. Here we find the line of cleavage between the two schools of thought upon the fundamental conception of the relations which the States bore to the Federal Government. Iredell was a Federalist, Wilson a Nationalist. Wilson opened his opinion with these words: "This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is whether this State, so respectable and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; may, and perhaps will be, ultimately resolved into one no less radical than this—do the people of the United States form a nation?" Iredell was

not a man to conceal his opinions when either propriety or duty demanded their expression. Meeting his associate upon the "main question," "So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I should not shrink from its discussion. But it is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution that it may not be improper to intimate that my present opinion is strongly against any construction of it which will admit, under any circumstances, a compulsive suit against the State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and nothing but express words or an insurmountable implication (neither of which I consider can be found in this case) would authorize the deduction of so high a power. * * * A State does not owe its origin to the government of the United States, in the highest or any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself, the salutary and deliberate choice of the people." He thus lays down a canon of Constitutional construction: "If, upon a fair construction of the Constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it is a power of first impression. If it does not exist upon that authority, ten thousand examples of similar powers would not warrant its assumption." That Iredell was in harmony with Hamilton is manifest from the following language used by

him in the Federalist: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. * * * There is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every restraint but that which flows from the obligation of good faith."[9] So Madison declared in the Virginia Convention. "It is not within the power of individuals to call a State into court."[10] Marshall, meeting the same objection to the Constitution, said: "I hope that no gentleman will think that a State will be called to the bar of the Federal Court. * * * It is not natural to suppose that the sovereign power should be dragged before a court."

Mr. Carson, writing of the opinion of the Court in Chisholm's case, says: "From these views Iredell alone dissented in an able opinion, of which it has been said that it enunciated, either directly or by implication, all the leading principles which have since become known as State Rights' Doctrine and which as a legal argument was far superior in clearness of reasoning to Wilson or Jay. He confined himself strictly to the question before the Court, whether an action of *assumpsit* would lie against a State."[11]

In his "Lives of the Chief Justices" Van Santvord says: "These views [of the majority] were not concurred in by Judge Iredell, who delivered a dissenting opinion. That

[9]No. 81 (J. C. Hamilton, Ed. 602).
[10]Elliott's Debates, 2d Ed., 533.
[11]Hist. Sup. Court, 174.

able jurist considered the question also in a Constitutional point of view, and as a question of strict construction. With great force of reasoning, and admirable precision and clearness of illustration, he analyzed the argument of the Attorney General, and arrived at exactly the opposite conclusion. His opinion was that no part of the existing law applied to this case; and even if the Constitution would admit of the exercise of such a power, a new law was necessary to carry the power into effect, and that *assumpsit* at the suit of a citizen would not lie against a State. One can scarcely arise from a careful perusal of this able opinion without being sensibly impressed with the force of the reasoning of the learned Judge, and the accuracy of his deductions. Lucid, logical, compact, comprehensive, it certainly compares very favorably with that of the Chief Justice in every respect, and as a mere legal argument must be admitted to be far superior.[12] * * * As a constitutional lawyer Judge Iredell had no superior upon the bench. His judicial opinions are marked by great vigor of thought, clearness of argument, and force of expression. He did not always concur with the majority of his brethren in their constitutional constructions, and on such occasion rarely failed to sustain his positions by the strictest legal as well as logical deductions. In the interesting case of *Ware v. Hylton,* 3 Dallas, 199, his dissenting opinion exhibits uncommon research, learning, and ability. As a legal argument it may be regarded as one of the best specimens that have been preserved of the old Supreme Court."[13]

"The rough substance of my argument in the suit against the State of Georgia," bearing date "February 18, 1793," as penned by the author, is before me. The writing is neat, the "headings" carefully arranged, a few erasures—interline-

[12] Page 60.
[13] *Ib.*, p. 61.

ations—showing care and caution in the form of expression. The argument covers twenty-three pages; the paper is well preserved and the writing distinct. Of this opinion Mr. Justice Bradley, in *Hans v. Louisiana,* 134 U. S., 14 (1889), said: "The highest authority of this country was in accord rather with the minority than with the majority of the Court. * * * And this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usages; and because the letter said that the judicial power shall extend to controversies between a State and citizens of another State, etc., they felt constrained to see in this language a power to enable the individual citizen of one State, or of a foreign State, to sue another State of the Union in the Federal Courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies by subjecting sovereign States to action at the suit of individuals (which he showed conclusively was never done before), but only by proper legislation to invest the Federal Courts with jurisdiction to hear and determine controversies and cases between the parties designated that were properly susceptible to litigation in courts. Adhering to the mere letter, it might be so; and so in fact the Supreme Court held in *Chisholm v. Georgia;* but looking at the subject as Hamilton and Mr. Justice Iredell did, in the light of history and experience, and the established order of things, the views of the latter were clearly right, as the people of the United States subsequently decided. * * * In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard." This language was approved by Fuller, C. J.; Miller, Field, Gray, Blatch-

ford, and Lamar, Associate Harlan, J., alone dissenting. It is not within the purpose or scope of this sketch to enter into a discussion of the merits of the great question involved in this battle of the giants or of the manner in which they sustained their conclusions. It is, however, a part of the history of the controversy and of the times, that two days after the opinion was filed sustaining the jurisdiction, by a majority of the Court, the Eleventh Amendment was introduced into Congress. "It was proposed by Mr. Sedgwick, a Representative from Massachusetts, but was passed in the Senate as amended by Mr. Gallatin."[14] Mr. Guthrie says that Mr. Caleb Strong was its author. The words are: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or proceeded against one of the United States by citizens of another State or by citizens or subjects of foreign States." It is significant that the language of the Amendment is declaratory of what, in the opinion of Congress, was the correct construction of the Constitution. It was essentially a reversal of the decision of the Court and writing into the Constitution the dissenting opinion of Justice Iredell. This is evidenced by the fact that notwithstanding that, in accordance with the decision in Chisholm's case, judgment was rendered for the plaintiff at February Term, 1794, and a writ of inquiry awarded, the Court, at February Term, 1798, in *Hollingsworth v. Virginia,* 3 Dallas, 378, upon being informed that the Eleventh Amendment had been adopted, "delivered an unanimous opinion that there could not be exercised any jurisdiction in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State." Mr. William D. Guthrie says: "The unusual and peculiar wording of the Amendment first attracts attention. Instead of declaring how the Constitution shall

[14]Watson's Const., 1535.

read in the future it declares how it shall 'not be construed.' * * * The Amendment, therefore, does not purport to amend or alter the Constitution, but to maintain it unchanged while controlling its scope and effect and thereby authoritatively declaring how it shall not be construed."[15] Mr. Justice Bradley says: "The Supreme Court had construed the judicial power as extending to such a suit, and the decision was overruled. The Court so understood the effect of the amendment."[16]

With that remarkable prevision which marks him as one of, if not the first, prophetic statesman which the world has produced, Hamilton points out the danger and difficulty which lurked in the construction given to the Constitution by the majority in Chisholm's case. He says: "To what purpose would it be to authorize suits against States for the debts they owed? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication and in destruction of a preëxisting right of the State Governments a power which would involve such a consequence, would be altogether forced and unwarrantable." This language becomes of present interest in the light of the concluding words of the opinion of Mr. Justice Holmes in *Virginia v. West Virginia.* "As this is no ordinary commercial suit but, as we have said, a quasi-international difference referred to this Court in reliance upon the honor and constitutional obligation of the States concerned rather than ordinary remedies, we think it best, at this stage, to go no further but to await the effect of a conference between the parties which, whatever the outcome, must take place. * * * But this case is one that calls for forbearance upon both sides; great States have a temper superior to that

[15]"The Eleventh Amendment."—Columbia Law Review, March, 1908.
[16]Hans v. Louisiana, 134 U. S. 11.

of private litigants and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union and mutual consideration to bring it to an end."[17] Certainly the history of attempts to enforce money demands against States, through Federal Courts, thoroughly vindicates the wisdom of Iredell's view and the apprehension expressed in his concluding words: "This opinion I hold, however, with all the reserve proper for one which, according to my sentiments in the case, may be deemed, in some measure, extra-judicial. With regard to the policy of maintaining such suits, is not for this Court to consider, unless the point in all other respects was very doubtful. Policy then might be argued from with a view to preponderate the judgment. Upon the question before us I have no doubt. I have, therefore, nothing to do with the policy, but I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the Attorney General. It is, however, a delicate topic. I pray to God that if the Attorney General's doctrine as to the law be established by the judgment of this Court, all the good he predicts of it may take place and none of the evils with which, I have the concern to say, it appears to me to be pregnant." In *South Dakota v. North Carolina,*[18] the question, as there presented, was discussed and decided against the contention of the State by a divided Court of five to four. The present Chief Justice wrote a strong and well sustained dissenting opinion, concurred in by Chief Justice Fuller, Justices McKenna and Day. The decree there was, however, confined to a statutory mortgage upon specific property. The question whether judgment for a deficiency would be entered was expressly reserved. The case was settled by compromise.

The Court has refused to take jurisdiction in a number of

[17]Virginia v. West Virginia, 220 U. S., 35.
[18]192 U. S., 286.

cases where the attempt was made to avoid the provisions of the Amendment.[19]

In *Penhallow v. Doane,*[20] Judge Iredell wrote an interesting opinion in which he discussed the relation which each of the original colonies bore to each other prior to the formation of the Confederation and the power conferred on the Confederation to establish Courts of Admiralty, and the effect of the judgments of such courts in prize cases. It is not practicable to make extracts from this opinion, but the following is of especial and permanent interest: "By a State forming a republic I do not mean the Legislature of the State, the executive of the State, or the judiciary, but all the citizens which compose that State and are, if I may so express myself, integral parts of it. * * * In a republic all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community which forms such body politic."

In *Talbot v. Jansen,*[21] an interesting question was presented in regard to the right of expatriation and how it was accomplished. Iredell wrote an opinion in which he discussed the law of nations, etc. Upon the right of expatriation and the limitations upon its exercise the opinion is interesting and enlightening.

In the case of *Hylton v. The United States,*[22] involving the question whether a tax on carriages was a direct tax, Iredell wrote a carefully guarded opinion concurring with the other Justices that the tax in question was not a direct tax within the meaning of the Constitution. He says: "There is no necessity or propriety in determining what is, or is not, a direct or indirect tax, in all cases. Some difficulties may arise which we do not at present foresee." His caution has

[19]Hans v. Louisiana, *supra.* Christian v. A. & N. C. R. R. Co., 123 U. S., 233; Murray v. Distilling Co., 213 U. S., 151.
[20]3 Dallas, 54.
[21]3 Dallas 133.
[22]3 Dallas, 171.

been justified by the history of the attempt to settle this much vexed question. Alexander Hamilton appeared for the Government. Iredell writes to Mrs. Iredell: "The day before yesterday Mr. Hamilton spoke in our court, attended by the most crowded audience I ever saw there, both Houses of Congress being almost deserted on the occasion. Though he was in very ill health he spoke with astonishing ability and in a most pleasing manner, and was listened to with the profoundest attention. His speech lasted three hours. * * * In one part of it he affected me extremely. Having occasion to observe how proper a subject it was for taxation, since it was a mere article of luxury which a man might either use or not as it was convenient to him, he added: 'It so happens that I once had a carriage myself and found it convenient to dispense with it.'"

At the Spring Term, 1793, of the Circuit Court at Richmond, before Jay, Iredell, and District Judge Griffin, the celebrated case of *Ware v. Hylton* was heard. During the war the Legislature of Virginia passed an act confiscating the debts of British subjects and directing the payment of such debts to the loan office of the State. The defendant, who was indebted to the plaintiff, a British subject, had, in obedience to the statute, made a partial payment thereon. Suit was brought on the bond. The defendants were represented by Patrick Henry, Marshall, Inis and Campbell. Iredell writes to Mrs. Iredell from Richmond, May 27th: "We began on the great British cases the second day of the court, and are now in the midst of them. The great Patrick Henry is to speak today. I never was more agreeably disappointed than in my acquaintance with him. I have been much in his company and his manners are very pleasing, and his mind, I am persuaded, highly liberal. It is a strong additional reason I have, added to many others, to hold in high detestation violent party prejudice."

The discussion was one of the most brilliant exhibitions ever witnessed at the bar of Virginia. Mr. Henry spoke for three consecutive days. The case was argued upon appeal at the February Term, 1796, of the Supreme Court,[23] Iredell wrote an opinion concurring with the majority of the Court that the Treaty of Peace enabled the creditor to sue for the debt, but was of the opinion (dissenting) that the recovery should be confined to the amount that had not been paid into the loan office. He said: "In delivering my opinion in this important case I feel myself deeply affected by the awful position in which I stand. The uncommon magnitude of the subject, its novelty, the high expectation it has excited, and the consequences with which a decision may be attended, have all impressed me with their fullest force." Referring to the argument, he said: "The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. However painfully I may at any time reflect on the inadequacy of my own talents I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard in this case. They have discovered an ingenuity, a depth of investigation and a power of reasoning fully equal to anything I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given way under its influence and the heart has been warmed while the understanding has been instructed." The opinion is exhaustive in learning. A competent judge has written that "as a legal argument it may be regarded as one of the best specimens that have been preserved of the old Supreme Court."[24]

Chief Justice Jay having resigned, and the Senate having refused to confirm the nomination of Judge Rutledge, there

[23] 3 Dallas, 199.
[24] Van Santvoord, Lives of the Chief Justices.

was much speculation as to who would be appointed. Governor Johnston wrote Iredell: "I am sorry that Mr. Cushing refused the office of Chief Justice, as I don't know whether a less exceptionable character can be obtained without passing over Mr. Wilson, which would perhaps be a measure that could not be easily reconciled to strict neutrality." Iredell writes Mrs. Iredell a few days after: "Mr. Ellsworth is nominated our Chief Justice, in consequence of which I think that Wilson will resign. * * * The kind expectation of my friends that I might be appointed Chief Justice were too flattering. Whatever other chance I might have had there could have been no propriety in passing by Judge Wilson to come at me."

Iredell rode the Middle Circuit during the spring of 1796. His charge at Philadelphia was published at the request of the grand jury. At the August Term, 1798, in the case of *Calder v. Bull,* [25] Iredell set forth very clearly his view respecting the power of the judiciary to declare invalid acts of the Legislature passed in violation of constitutional limitations. He says: "In a government composed of legislative, executive and judicial departments, established by a Constitution which imposed no limits on the legislative power, the consequence would inevitably be that whatever the Legislature chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I can not think that under such a government any court of justice would possess the power to declare it so. * * * It has been the policy of all the American States, which have individually framed their State Constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with pre-

[25] 3 Dallas, 386.

cision the objects of the legislative power and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a State, violates those Constitutional provisions, it is unquestionably void; though I admit that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case. If, on the other hand, the Legislatures of the Union shall pass a law within the general scope of their Constitutional power, the Court can not pronounce it to be void merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject, and all that the Court could properly say in such an event would be that the Legislature had passed an act which, in the opinion of the Judges, was inconsistent with the principles of natural justice." It is doubtful whether this principle, peculiar to American Constitutional law, with its limitations, has been more accurately stated.

Judge Iredell rode the Eastern Circuit with Judge Wilson. He was much pleased with the people of New England, receiving many courtesies from them. He writes from Boston that he soon found himself "engaged for every day in the week—sometimes different invitations on the same day. Judge Lowell has been particularly kind to me." His charge to the grand jury at Boston was published by request and referred to by the editor of the paper as "uniting eloquence with exhaustive knowledge and liberality." From Boston he writes: "I have constantly received distinction and courtesy here, and like Boston more and more. * * * It is scarcely possible to meet with a gentleman who is not a man of education. Such are the advantages of schools of public authority; every township is obliged to maintain one or more to which poor children can have access without

any pay." He writes from Exeter, New Hampshire: "I met in Boston with a gentleman who lives in Newbury Port of the name of Parsons, who appears to me to be the first lawyer I have met with in America, and is a remarkably agreeable man." This was Theophilus Parsons, later Chief Justice of Massachusetts. He writes that he had dined with the Committee and Corporation of Harvard College, "being seated next to the Lieutenant Governor, the famous Samuel Adams, who, though an old man, has a great deal of fire yet. He is polite and agreeable."

On May 27, 1797, Judge Iredell delivered a charge to the grand jury in Richmond, Virginia, which was "animated, perhaps too warm." At that time the grand jury frequently made presentment of matters which they regarded as worthy of public attention, although not the subject of criminal prosecution. They presented "as a real evil the circular letters of several members of the last Congress, and particularly letters with the signature of Samuel J. Cabell, endeavoring, at a time of real public danger, to disseminate unfounded calumnies against the happy Government of the United States, thereby to separate the people therefrom and to increase or produce a foreign influence ruinous to the peace, happiness and independence of these United States." Mr. Cabell made an angry retort, attacking the jury, judge and the Supreme Court. He proposed to bring the matter before Congress as a breach of privilege. Mr. Jefferson urged Mr. Monroe to call it to the attention of the Legislature. Just what they proposed to do with the jury or the judge does not very clearly appear. Judge Iredell published a card in which he said that the charge was prepared before he reached Richmond and had been delivered in Pennsylvania and Maryland; that he was not acquainted with Mr. Cabell and knew nothing of the letters referred to by the grand jury. He concludes: "With regard to the illiberal

epithets Mr. Cabell has bestowed not only upon me, but on the other Judges of the Supreme Court, I leave him in full possession of all the credit he can derive from the use of them. I defy him, or any other man, to show that, in the exercise of my judicial character, I have ever been influenced in the slightest degree by any man, either in or out of office, and I assure him that I shall be as little influenced by this new mode of attack by a member of Congress as I can be by any other." The political feeling in the country, and especially in Virginia, was at that time very bitter. Governor Johnston, Judge Iredell's brother-in-law, and always his wise friend, writing him in regard to this incident, said: "The answer was very proper, if proper to give it any answer at all." He further said that which every Judge knows from experience to be true: "I am sensible of the difficulties with which a man of warm feelings and conscious integrity submits to bear, without a reply, unmerited censure; yet I am not certain but that it is more suitable to the dignity of one placed in high and respectable departments of State to consider himself bound to answer only when called upon constitutionally before a proper tribunal."

Iredell rode the Southern Circuit during the spring of 1798, suffering much fatigue and discomfort. Judge Wilson, having suffered financial reverses, sought the hospitality of Governor Johnston and Judge Iredell, and found in them sympathetic friends. His health failed rapidly, resulting in his death August 21, 1798. He was buried at Hayes, the home of Governor Johnston. His remains were removed to Philadelphia a short time since. At the February Term, 1799, of the Supreme Court, Iredell sat for the last time. He filed "one of his best and most carefully written opinions" concurring with the conclusion reached by the other Judges in *Sims v. Irvine*.[26] He held the Circuit Court at

[26] 3 Dallas, 425.

Philadelphia, at which term several of the insurgents were on trial for treason. In his last charge to the grand jury he dwelt at much length on the law of treason and the Alien and Sedition laws. It is manifest that Iredell, as were many others, was deeply impressed with the belief that French philosophy and infidelity, coupled with the revolutionary proceedings in that country, were making an impression upon the people of this country, finding defenders among leaders of public sentiment, seriously threatening the peace of the country and the dissolution of the Union. He was a Federalist and joined with the members of that party in their reverence for Washington. He disliked and distrusted the French leaders and their principles. His charge was filled with warning against the influence of principles and conduct which, in his opinion, were involving the American people in the French Revolution, and the disturbed relations of that country with England. His concluding words in his last charge to a grand jury are interesting and illustrative of the condition of his mind. He says: "If you suffer this government to be destroyed what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under foot. May that God, whose peculiar province seems often to have interposed to save these United States from destruction, preserve us from this worst of all evils, and may the inhabitants of this happy country deserve His care and protection by a conduct best calculated to obtain them." The grand jury, requesting the publication of the charge, say: "At a time like the present, when false philosophy and wicked principles are spreading with rapidity under the imposing garb of liberty over the fairest country of the old world, we are convinced that the publication of a charge fraught with such clear and just observations on the nature and operation of the Con-

stitution and laws of the United States will be highly beneficial to the citizens thereof." As an illustration of the condition of public sentiment, Governor Johnston writes Iredell who, having concluded the trials in Philadelphia had come to Richmond, "I am glad that you have got away from the land of *treason* to the land of *sedition;* the change is something for the better." Chief Justice Ellsworth, riding the Southern Circuit, writes Iredell from Raleigh, N. C., June 10, 1799: "My opinion, collected from some gentlemen who have been lately traveling in that State (Virginia), and others who were at the Petersburg races, presents a melancholy picture of that country. These gentlemen returned with a firm conviction that the leaders there were determined upon the overthrow of the general government. * * * That the submission and assistance of North Carolina was counted on as a matter of course." The Chief Justice, however, adds: "As it was shortly after the election these may have been the momentary effusions of disappointed ambition."

Thirty years of constant and wearing work, coupled with the climate in which he lived and the long journeys on the Southern Circuit, which he rode four times in five years, had impaired Judge Iredell's health. He was unable to attend the August Term, 1799, of the Court. His illness increased until, on October 20, 1799, at his home in Edenton, he passed away, in the forty-ninth year of his age. His friend, the Rt. Rev. Charles Pettigrew, testified of him: "In the run of the above twenty years I have often heard high encomiums on the merits of this great and good man; but never in a single instance have I heard his character traduced or his integrity called in question."

His biographer, from whose excellent work I have largely drawn in the preparation of this sketch, says that with Judge Iredell's papers is an original "Treatise on Evidence," "an

* * * Essay on the Law of Pleading," and one on the "Doctrine of the Laws of England concerning Real Property so far as it is in use or force in the State of North Carolina"; the two last unfinished.

When it is remembered that he came to America at seventeen years of age, with neither wealth nor family influence; that his opportunities and sources of study were limited by the condition of the country; that for seven of the thirty years of his life here the country was engaged in war, we can, in some degree, appreciate the immense labor which he performed and the results which he accomplished. His life is a tribute to the teaching and example of his parents, the influence of those with whom he was brought into association in his adopted home, his industry, talents, patriotism, and lofty principles of honor and integrity.

Judge Iredell left one son, bearing his name, who became a lawyer of learning and distinction, Judge of the Superior Court, Governor, and United States Senator. He was, for many years, Reporter of the Supreme Court of the State and author of an excellent work on "The Law of Executors." He died during the year of 1853. His descendants are among the most honorable, useful and patriotic citizens of the State.

It has been the purpose of this sketch to set forth, in the space which could be allotted, a short survey of the judicial work of Judge Iredell. His early death cut short a career on the bench full of promise of enlarging scope and usefulness. That he would have continued to develop his high judicial qualities and, if permitted, shared with the "Great Chief Justice" the work of laying deep and strong the foundations of American Constitutional law can not be doubted. His opinions upon Constitutional questions evince a very high order of judicial statesmanship.